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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1859

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT MATTER INDEX

	Page
Table of Authorities	ii
Introduction	1
Reply to Respondent's Reasons for Denying the Writ	2
I. The Court Should Review and Reverse the Court of Appeals' Decision to Toll the Statute of Limitations	2
A. The Court of Appeals' Decision Conflicts With This Court's Decision in *Board of Regents v. Tomanio,* 48 U.S.L.W. 4556 (May 19, 1980)	2
B. Mt. Hood's Response Demonstrates the Need for This Court to Review the Decision Below	4
II. The Court Should Review the Constitutional Issues	7
III. The Court Should Review the Interest Questions	8
A. The Prejudgment Interest Issue Is Substantial	8
B. The Attorneys' Fees Interest Question Should be Resolved by This Court	8
Conclusion	9

TABLE OF AUTHORITIES

Cases	Pages
Board of Regents v. Tomanio, 48 U.S.L.W. 4556 (May 19, (1980)	2, 3, 4
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	4
Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316 (5th Cir. 1978)	8
Electrical Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976)	3, 4
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978)	3
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	3, 4, 6
McGuire v. Leigh, 48 U.S.L.W. 3767 (May 27, 1980)	4
United States v. Michigan National Corp., 419 U.S. 1 (1974)	4

Statutes	
15 U.S.C. § 15	4, 8
15 U.S.C. § 15b	2
15 U.S.C. § 16(i)	2
49 U.S.C. § 5(10)	4

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INTRODUCTION

As it has throughout this litigation, Mt. Hood devotes much of its Brief in Opposition ("Br. Opp.") to reviling Greyhound. Obviously Mt. Hood seeks to persuade this Court that Greyhound is evil, that it deserves whatever it gets and that the Court should ignore the important questions of law and policy this case presents. That stratagem failed the last time Mt. Hood tried it with this Court, and it even more clearly deserves to fail this time.[1]

1. The stratagem includes distortions of the record and even of this Court's prior action. For example, apparently in an attempt to make the Court believe that it has already denied certiorari on the "equitable tolling" issues, Mt. Hood states that Greyhound previously sought certiorari on them but that this Court declined to decide them. (Br. Opp., pp. 7, 20) That is false. In truth, when the case was last before the Court, neither the District Court nor the Court of Appeals had even considered those issues, and obviously Greyhound did not seek certiorari on them. (Petition, No. 77-598, pp. 2-4) It was Mt. Hood that sought affirmance on its equitable tolling claim; Greyhound merely pointed out that the Court should not allow the result below to stand on the basis of that novel claim without considering it on its merits. (Reply Br. in Support of Petition, No. 77-598, p. 10) The same is true now.

Nothing Mt. Hood says can alter the fact that the Court of Appeals has tolled the statute of limitations in circumstances and on stated grounds that have never before been held to justify tolling. The decision below is inconsistent with this Court's prior decisions on tolling, and it has implications far beyond this case because it creates a new tolling exception which, if left standing, will apply to countless antitrust cases. This Court should consider that rule now.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. The Court Should Review and Reverse the Court of Appeals' Decision to Toll the Statute of Limitations.

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN BOARD OF REGENTS V. TOMANIO, 48 U.S.L.W. 4556 (MAY 19, 1980).

Board of Regents is the Court's latest word on tolling. It again holds that the statute of limitations is not tolled by the pendency of a prior proceeding which attacks the same conduct. Mt. Hood's relegation of that important decision to a brief footnote reference (Br. Opp., p. 12 n.9) cannot obscure that *Board of Regents* reaffirms principles which are diametrically opposed to those on which the decision below rests, and effectively repudiates most of the arguments Mt. Hood makes in opposition to the petition.

First, *Board of Regents* reiterates the "fundamental" nature of statutes of limitations and that they "are more than a technical obstacle to be circumvented if possible." 48 U.S.L.W. at 4559, 4558. By treating Mt. Hood's failure to file its antitrust complaint within the limitations period as a mere "technical omission" (Petition, App. A, p. 11), the decision below takes precisely the opposite approach.

Second, *Board of Regents* holds that tolling is a question of statutory construction, and that where a statutory limitations scheme includes coordinate tolling rules, courts normally are not free to interfere and create new tolling rules based on policy considerations. 48 U.S.L.W. at 4559-60. Sections 4B and 5(i) of the Clayton Act, 15 U.S.C. §§ 15b, 16(i), constitute a limitations

scheme with integrated tolling rules designed to avoid uncertainty and "undue prolongation" of private antitrust actions. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978). Congress considered and specified what prior proceedings toll the antitrust statute of limitations, and the ICC proceeding here involved does not meet Congress' specific tolling requirements. By holding that the ICC proceeding nevertheless tolls the statute, the Court of Appeals has once again overridden Congress' language and intent with its own views of policy, and its decision therefore conflicts with the principles of statutory construction set forth in *Board of Regents*.[2]

Third, *Board of Regents* rejects the central core of the Court of Appeals' and Mt. Hood's efforts to distinguish *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). The Court of Appeals concludes that because courts sometimes refer issues to the primary jurisdiction of administrative agencies, Mt. Hood's ICC and antitrust remedies were "interdependent", and thus Congress intended a prior administrative proceeding to toll the antitrust statute of limitations. (Petition, App. A, pp. 17-18) But *Board of Regents* holds that, for tolling purposes, remedies are "independent" if they have separate legal origins and the pursuit of one is not an express prerequisite to commencing an action to enforce the other. 48 U.S.L.W. at 4559-60. As the Court explained and held:

> "Unless [a federal] remedy is structured to require previous resort to state proceedings, so that the claim may not even

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2. The decision below is based upon the Court of Appeals' policy conclusion that a failure to toll the statute would conflict with the purpose of the primary jurisdiction doctrine to afford the agency an opportunity to decide regulatory issues before the courts decide antitrust issues. (Petition, App. A, p. 17) That conclusion rests on inconsistent assumptions. (Petition, pp. 15-16) But even if it were correct, that conclusion can no more justify tolling than could the similar conclusion in *Board of Regents* that tolling would further the policies of federalism and abstention by permitting state courts to resolve state law questions before federal courts addressed constitutional issues. *Compare* 48 U.S.L.W. at 4560 *with* 48 U.S.L.W. at 4561 (Brennan, J. dissenting).

> be maintained in federal court unless such resort be had [citation omitted], it cannot be assumed that Congress wishes to hold open the independent federal remedy during any period of time necessary to pursue alternate state-court remedies." 48 U.S.L.W. at 4560.

It is indisputable that Mt. Hood's ICC and antitrust remedies had independent legal origins,[3] and despite Mt. Hood's argument (Br. Opp., p. 10)—which the decision below does not adopt—it is clear that pursuit of its ICC remedy was not a prerequisite to the maintenance of its antitrust claim in federal court. (pp. 5-6, below)

Board of Regents makes it clear that the decision below cannot stand. *See McGuire v. Leigh,* 48 U.S.L.W. 3767 (May 27, 1980).

B. MT. HOOD'S RESPONSE DEMONSTRATES THE NEED FOR THIS COURT TO REVIEW THE DECISION BELOW.

Mt. Hood cannot deny either that the decision below fails to follow the complete identity requirement of *Johnson* and *Electrical Workers* or that it is irreconcilable with the language of *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966) and *United States v. Michigan National Corp.,* 419 U.S. 1 (1974).[4] Instead, Mt. Hood defends the decision below by a new theory of its own. Mt. Hood argues that tolling is proper here because when it commenced its ICC proceeding it "could not go to the District Court" and therefore "had no choice of forum". (Br. Opp., p. 10) Mt. Hood would have this Court believe that in going to the ICC

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3. Mt. Hood's ICC petition was brought under Section 5(10) (formerly Section 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to determine the extent of the Greyhound's obligations arising out of the ICC's acquisition approvals and to enforce the national transportation policy. This antitrust case was brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, for alleged monopolization, attemped monopolization and restraint of trade. Mt. Hood agrees. It says that "the legal ingredients of [its] case (antitrust standards) and those to be applied by the ICC (regulatory standards) *are radically different.*" (R. 210) (emphasis added)

4. Mt. Hood does repeat the Court of Appeals' error of stating that limitations was not involved in *Carnation* (Br. Opp., p. 17), but that is wrong. (Petition, p. 9, n.4)

first it was relying on Ninth Circuit precedent and the governing law with respect to injunctive relief. (Br. Opp., pp. 10-11, 13, 17-18)

But the decision below cannot be justified by reference to Mt. Hood's belief as to whether it could independently pursue its ICC and antitrust remedies. The Court of Appeals expressly rejected that approach, holding Mt. Hood's state of mind on the question to be irrelevant. (Petition, App. A, p. 23). Instead, the Court of Appeals adopted a sweeping new tolling theory that is applicable to any antitrust case which raises questions arguably within an agency's primary jurisdiction. Mt. Hood's defense of a decision which was not rendered cannot affect the need for this Court to review the decision which was.

Similarly, Mt. Hood's assertion that its ICC proceeding was a " 'prerequisite' to its later damage action" (Br. Opp., p. 12) is plainly incorrect. It was not prerequisite in any factual sense because Mt. Hood did not rely on its perceptions of the applicable law in going to the ICC.[5] Nor was it prerequisite in any legal sense. Plaintiffs have always filed antitrust complaints against regulated businesses without first going to an administrative agency.

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5. Mt. Hood did not even consult an attorney about a private antitrust case against Greyhound until 1968 (Tr. 3774), and Mt. Hood's lawyers did not even think up their current reliance excuse until their brief to this Court in 1978. Prior to that Mt. Hood took precisely the opposite position: that it did have its choice of forum, that its complaint did *not* involve matters within the ICC's primary jurisdiction, and that the injunctive relief it most needed could be obtained only from the court. (Petition, p. 18; R. 1, 9-10, 247, 250-51, 1127-29) Moreover, the Ninth Circuit's *Carnation* decision was in effect only from July 1964 to February 1966, and that is the only period during which Mt. Hood could be excused from filing its complaint even under its theory. But three and one-half years of the statute had run before *Carnation* was decided by the Ninth Circuit, and thus Mt. Hood had only six months within which to file after *Carnation* was reversed. Instead Mt. Hood waited an additional two and one-half years before bringing this action, and therefore its pre-1964 claims are time-barred, even if it did rely on *Carnation* and even if that reliance did toll the statute. Thus tolling here does not depend on a plaintiff's reliance on an erroneous decision. Instead, tolling has been permitted where Mt. Hood was aware of its claims but simply did not consider bringing a lawsuit until the statute of limitations had extinguished some of them. That is sleeping on one's rights.

Indeed, the doctrine of primary jurisdiction would never have been developed if that was not the normal and expected way to proceed. That is also the way which sound public policy requires plaintiffs to proceed, regardless of whether a court dismisses or stays a complaint raising primary jurisdiction issues, because it is the only way in which the antitrust court, instead of the plaintiff, can determine whether exercise of an agency's primary jurisdiction is appropriate and, if so, with respect to what issues.

In short, Mt. Hood's damage remedy could be obtained from the court (and only the court), and like any other antitrust plaintiff, Mt. Hood was free to file its complaint any time after it learned of its claims in 1960. (R. 2249) In no way did either the availability of independent administrative remedies or the Ninth Circuit's erroneous decision in *Carnation* three and a half years later, prevent it from taking that minimal step to preserve its pre-1964 claims. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

Finally, Mt. Hood argues that the Court of Appeals' new tolling rule will not create uncertainty because courts frequently exercise their equity powers to toll limitations periods. (Br. Opp., pp. 16, 19-20) But the lower court cases Mt. Hood cites announce no such general rule,[6] and the prior decisions of this Court establish that tolling can occur only pursuant to specific standards capable of certain and predictable application. (Petition, pp. 13-14) The primary jurisdiction doctrine is not composed of certain legal standards, and Mt. Hood fails to explain how, sixteen years after the fact, that uncertain doctrine can be applied with certainty to a complaint that never was filed. (Petition, pp. 17-20)

The decision below does not advance the doctrine of primary jurisdiction but defeats it. It is contrary to Congress' intent in

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6. Mt. Hood's cases (Br. Opp., p. 16 n.13) either have been reversed (*Leigh*); involved exactly the same cause of action (*Billings, Woodbury*); involved situations where pursuit of the prior proceeding was required (*Strickland, Pesola*); or involved defendant's acts of concealment (*Dartt, Reeb*). In one case, *Ashland Oil,* the issue was not discussed.

adopting an integrated limitations scheme. It fails to apply the Court's prior tolling decisions. If permitted to stand it will mean that a different limitations rule applies to corporate antitrust plaintiffs seeking multiple damages than to victims of racial discrimination and other unconstitutional conduct. The Court should grant the petition for certiorari, establish that the same legal principles apply to this case as to others, and reverse the decision below before it spawns a new and undesirable antitrust tolling rule.

II. The Court Should Review the Constitutional Issues.

The Court of Appeals' decision to toll the statute rests in part on its own resolution of facts as to which Greyhound had neither notice nor an opportunity to be heard. (Petition, pp. 21-24) Mt. Hood says that the deprivation of Greyhound's rights may be excused because Greyhound previously argued that Mt. Hood's tolling theory was invalid as a matter of law. (Br. Opp., p. 21) But, prior to the decision below, the lower courts had not adopted a non-statutory tolling theory, and Greyhound had no reason to assume that they would adopt an unprecedented rule which was inconsistent with constitutional rights.

Mt. Hood also argues that in other tolling cases the issue was decided by the court, not the jury. (Br. Opp., pp. 20-21) But those other decisions found tolling as a matter of law; they did not turn on the resolution of questions of fact. (Petition, pp. 10-11, 21) Here the Court of Appeals' decision rests both on policy (primary jurisdiction) and factual findings (adequacy of notice). As is the case with fraudulent concealment, the factual questions necessary to tolling should have been the subject of trial and should have been tried to the jury.[7] (Petition, p. 23)

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7. Mt. Hood's argument that the decision below turns not upon facts, but only upon "policy questions" (Br. Opp., pp. 20-21) is inconsistent with its earlier arguments which attempted to justify the decision below on the ground that it did turn on questions of fact, such as the "reasonableness of Mt. Hood's conduct" which it says the lower courts "painstakingly weighed". (Br. Opp., pp. 15-17) Mt. Hood cannot have it both ways.

III. The Court Should Review the Interest Questions.

A. THE PREJUDGMENT INTEREST ISSUE IS SUBSTANTIAL.

Mt. Hood's response to the demonstration that the decision below conflicts with decisions of this Court and of two other courts of appeals (Petition, pp. 24-25) is to misstate Greyhound's position. Greyhound does not "request that Mt. Hood be denied interest on its judgment". (Br. Opp., p. 22) Greyhound argues only that, consistent with the Court's prior decisions, Mt. Hood cannot be awarded interest on a vacated judgment. The conflict in decisions cannot be wished away, and the very number of cases cited by Mt. Hood shows that the subject is controversial and that the law is unclear.

B. THE ATTORNEYS' FEES INTEREST QUESTION SHOULD BE RESOLVED BY THIS COURT.

Mt. Hood admits that the decision below squarely conflicts with *Carpa, Inc. v. Ward Foods, Inc.*, 568 F.2d 1316 (5th Cir. 1978).[8] The issue is not "trivial" (Br. Opp., p. 25) because it is present in every antitrust case in which a plaintiff prevails.

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8. Mt. Hood says that *Carpa* is a "mere aberration" (Br. Opp., p. 25), but the cases it cites either did not arise under 15 U.S.C. § 15 or are cases ending in settlements which provide for interest on attorneys' fees.

CONCLUSION

The decision below is bad law and bad policy and its ramifications are alarming. The need for this Court's guidance is clear. The Petition should be granted.

Respectfully submitted,

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